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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 540

DANIEL LEWIS,

Appellant,

—versus—

FLORA TRUDY MOORE (Widow), *et al.*, and Intervenors R. M. TURNELL and R. D. MORGAN,

Appellees.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

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DANIEL LEWIS,

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FLORA TRUDY MOORE (Widow), *et al.*, and Intervenors R. M. TURNELL and R. D. MORGAN,

Appellees.

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to Rules 13 and 15 and the Revised Rules of the Supreme Court of the United States, file this, their STATEMENT, of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Supreme Court of North Carolina, which has upheld the constitutionality of state statutory provisions, as applied, against appellant's contention that the same contravened his rights under the state and federal Constitutions.

Opinion Below

The Supreme Court of North Carolina filed a written Opinion in this cause on the 8th day of April, 1959. The said Opinion is reported in the following publications: 250 N.C. 77 and 108 S.E. 2d 26. The Opinion of the Supreme Court of North Carolina is reproduced in the appendices

to this STATEMENT as "Appendix A" hereof. The Judgment of the Supreme Court of North Carolina issued on the 8th day of April, 1959, to the Superior Court of Pender County and is a part of the Record before this Court. The Judgment of the Superior Court of Pender County, from which appellant Daniel Lewis prosecuted and appealed to the Supreme Court of North Carolina and which was affirmed by the Judgment of the Supreme Court of North Carolina, is found in the record which was before the Supreme Court of North Carolina and in the Record before this Court. The said Judgment of the Superior Court of Pender County, which is dated the 19th day of September, 1958, is reproduced in the appendices to this STATEMENT as "Appendix D" hereof. Following the entry of the Opinion of the Supreme Court of North Carolina, appellant Daniel Lewis filed a Petition to Rehear in the Supreme Court of North Carolina on the 14th day of May, 1959. On the 24th day of June, 1959, the Supreme Court of North Carolina entered an Order by which it denied the Petition to Rehear. Both the Petition to Rehear and the Order entered thereon are parts of the Record before this Court and they are reproduced in the appendices to this STATEMENT as "Appendix B" and "Appendix C" respectively. The Order upon the Petition to Rehear is not otherwise reported.

Jurisdiction

This appeal herein is from the final Order of the Supreme Court of North Carolina which denied a Petition to Rehear. See Appendices "B" and "C" of this STATEMENT. The Order of the State Supreme Court, which is herein appealed from, was entered on the 24th day of June, 1959, and sustained the constitutional validity of North Carolina General Statutes 1-65.1 and 46-22, as construed and interpreted by it as an initial proposition, in the Opinion which

it had rendered upon appellant's appeal from the Superior Court to the State Supreme Court. This Court has jurisdiction to review by direct appeal, the Order of the Supreme Court of North Carolina by virtue of the provision of Title 28, United States Code, Section 1257(2) which provides for an appeal, "where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or law of the United States and the decision is in favor of its validity," 28 U.S.C. 1257(2).

Appellant has raised the constitutional question at the very earliest opportunity. The Superior Court of Pender County, State of North Carolina, never reached nor considered any questions relating to the application of either of the two statutory provisions involved on this appeal, inasmuch as the said court took the highly tenuous and indefensible position that appellant was estopped to question either the appointment of a guardian *ad litem* or the sale of his land under order of the Court. (Record, State Court pp. 99-105.) Appellant's appeal to the Supreme Court of North Carolina was addressed to this position of the Superior Court of Pender County. (Record, State Court pp. 105-113.) The Supreme Court of North Carolina, with propriety, totally ignored the position of the Superior Court relative to its application of the doctrine of estoppel, and, instead, fashioned for the first time interpretations and construction of the North Carolina General Statutes 1-65.1 and 46-22 which it applied to appellant. See the Opinion of the State Supreme Court, 250 N.C. 77, 108 S.E. 2d 26. See, also, "Appendix A" of this STATEMENT. Only after the rendering of the Opinion by the Supreme Court of the State of North Carolina, did appellant's constitutional difficulties have origin. See *Saunders* v. *Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.ed. 1113; *State of Ohio ex rel. Bryant* v. *Akron Metropolitan Park District for Summit County*,

F. A., 281 U.S. 74, 50 S.Ct. 228, 74 L. ed. 710. Appellant met the judicial threat to his constitutional right which the State Supreme Court had extended by Petition to Rehear, in which he meticulously alleged and asserted the unconstitutionality of the above mentioned statutory provisions as applied to him and to the cause of action in which he is a party-defendant. For other authorities in support of this Court's jurisdiction of the instant appeal see the following authorities: *Harding* v. *Illinois*, 196 U.S. 78, 25 S.Ct. 176, 49 L. ed. 394; *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 42 S.Ct. 106, 66 L. ed. 239; *Beard* v. *City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L. ed. 1233; *Lovell* v. *City of Griffin, Ga.*, 303 U.S. 444, 58 S.Ct. 66, 82 L. ed. 949; *Chicago I. & P. R. Co.* v. *Perry*, 259 U.S. 548, 42 S.Ct. 524, 66 L. ed. 1056; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L. ed. [illegible]; *Nickey* v. *Mississippi*, 292 U.S. 393, 54 S.Ct. 743, 78 L. ed. 1323; *Whitfield* v. *Ohio*, 297 U.S. 431, 56 S.Ct. 432, 80 L. ed. 778; *People of Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign, Ill.*, 333 U.S. 203, 68 S.Ct. 461, 92 L. ed. 648, 2 A.L.R. 2d 1338; *People of State of New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L. ed. 184.

Questions Presented

Appellant first reached the Supreme Court of North Carolina by an appeal from the Superior Court's denial of his Motion in the cause filed after entry of judgment in a purported proceeding for partition by sale. In his after judgment motions appellant sought to have vacated (1) an appointment of a guardian *ad litem* for him and, (2) order of sale of his property which was ordered sold presumably pursuant to statutory powers in order to effect partition by sale of realty. (Record, State Court pp. 81-83.) The

Superior Court had declined to grant appellant's motion and had predicated its judgment, which denied appellant relief, upon the grounds that appellant was estopped to raise questions relating to the appointment of a guardian *ad litem* for him and relating to the validity of the order of the sale of his property. (Record, State Court pp. 95-105.) From the Superior Court's manner of disposing of appellant's contention, appellant appealed to the Supreme Court of North Carolina, objecting and excepting particularly to the findings of facts and conclusions of law contained in the Judgment of the Superior Court, which was entered upon his after judgment motions. (Record, State Court pp. 105-113.)

In its Opinion, the Supreme Court of North Carolina affirmed the Judgment of the Superior Court by an expressed construction and interpretation of North Carolina General Statute 1-65.1, which pertains to the appointment of guardians *ad litem*; and by an indispensable and implied construction and interpretation of North Carolina General Statute 46-22, which pertains to the partition of realty by sale. Upon encountering for the first time the interpretation and construction of North Carolina General Statutes 1-65.1 and 46-22, which the State Supreme Court applied to appellant and which it had not previously applied or intimated in any prior decision, appellant petitioned for rehearing and alleged that the novel and surprising constructions and interpretations of the North Carolina General Statutes 1-65.1 and 46-22 were unconstitutional as applied to appellant. (See "Appendix B," this STATEMENT.) The Supreme Court of North Carolina entered its Order upon appellant's Petition in which it denied the Petition to Rehear. Hence, the questions presented or proposed for review by this Court are as follows:

(a) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation

and application of North Carolina General Statute 46-22 to the facts of the instant case and to appellant, whereby appellant's property has been condemned and confiscated for the private use and profit of other individuals, to wit, appellees, and whereby appellant has been denied the fundamental privilege and right of holding, possessing and enjoying his property free and secure against the unfounded and disproven claims of others, contrary to the Privileges and Immunities, Due Process and Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

(b) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation and application of North Carolina General Statute 46-22 to the facts of the instant case and to appellant, whereby appellant's real property was ordered sold and sold upon order of the Court below for partition, in an action wherein none of the tenants in common of the lands so ordered sold and sold upon order of the Court below, desired or requested or assented to partition in any manner whatsoever or were parties-petitioners invoking any relief under North Carolina General Statute 46-22?

(c) Is North Carolina General Statute 46-22 as interpreted and construed by the Supreme Court of North Carolina constitutional, when measured by the Privileges and Immunities, Due Process and Equal Protection Clauses to the 14th Amendment to the Constitution of the United States, where applied to the sale for partition of lands in an action in which none of the owners of the lands sold for partition desire, request or assent to partition of any description and where some of the owners of the said land so sold are not before the court?

(d) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation and application of North Carolina General Statute 1-65.1 as applied to the instant case and to appellant, under which statute the said court has approved and sanctioned the appointment of a guardian *ad litem* for appellant without hearing or adjudication of appellant's mental competence in a manner contrary to the Privileges and Immunities, Due Process and Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

(e) Has the Supreme Court of North Carolina upheld, affirmed and applied an unconstitutional interpretation and application of North Carolina General Statute 1-65.1, whereby appellant was required to be represented by a guardian *ad litem* in litigation concerning his interest and rights in land, although presumably and judicially competent to handle his own affair, when the said interpretation and application is measured by the standards of the Privileges and Immunities, Due Process and Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

(f) Is North Carolina General Statute 1-65.1, as interpreted and construed by the Supreme Court of North Carolina, constitutional, when measured by the Privileges and Immunities, Due Process and Equal Protection Clause of the 14th Amendment to the Constitution of the United States, where applied to the appointment of and representation by a guardian *ad litem* of one presumably and judicially competent and willing to handle his own affairs and litigation in a matter touching, concerning and involving his interest and right in land?

Statement of Case

The instant action was instituted as a special proceeding for partition of realty by sale. The action was instituted on the 3rd day of March, 1953. The Petitioners alleged tenancy-in-common of the lands involved as heirs of Richard Lewis (Record, State Court p. 8), the common ancestors of all petitioners and defendants. Service of process over several of defendants, to wit, Willie Pridgen and wife, Dan Pridgen and wife, Fredie Pridgen and wife, Nicholas Pridgen and wife and Joe Pridgen and wife, all being children of Addie Pridgen, the deceased sister of appellant Daniel Lewis and heirs of the ancestor Richard Lewis, was attempted by publication, the affidavit and order for same being dated the 27th day of August, 1953 (Record, State Court p. 12).

The order of sale of the premises purportedly involved was dated August 30, 1954, and was entered by Honorable C. D. Murphy, Clerk of Superior Court of Pender County. (Record, State Court pp. 17-18). The judgment of Confirmation of Sale was entered by the Honorable Clerk on March 15, 1955 (Record, State Court pp. 30-31). Prior to sale or confirmation of sale, appellant Daniel Lewis had filed no answer or pleading to the Petition in this cause.

Sometime after July 9, 1955, and after a purported appointment of a guardian *ad litem* for appellant Daniel Lewis, process was initiated in the name of appellant, in which the Court was petitioned to hold that no jurisdiction had been obtained over appellant by reason of an alleged failure of petitioners to cause appellant to be served with process, as required by law. (Record, State Court pp. 40-41.) On July 9, 1955, upon the basis of the affidavit of the Reverend G. P. House, dated July 8, 1955, the Honorable Clerk entered an order adjudging Daniel Lewis to be in-

competent (Record, State Court p. 37), and said Clerk presumed upon the basis of this *ex parte* hearing on the matter of appellant's competence, to appoint one Aaron Kelly as guardian *ad litem* for appellant. (Record, State Court p. 37.) A paper writing purporting to be an order, appears in this proceeding, signed by Honorable Clawson Williams, Judge of the Superior Court, presumably overruling the contention that the court had obtained and acquired no jurisdiction over appellant, but purporting to transfer appellant's interest in the lands described in the Petition into interest in the funds on hand in the Clerk's office from the purported sale of the lands described. (Record, State Court p. 52.) This proceeding was conducted subsequent to the presumptive appointment of a guardian *ad litem* for appellant, which was without hearing or notice to appellant or anyone else.

On March 23, 1955, Turnell and Morgan, a co-partnership, had filed a motion in this cause in which motion they raised questions: (1) pertaining to appellant's interest in the lands involved in this action, in that appellant had recorded a deed in Book 328, page 63, under which he ostensibly had acquired a $\frac{2}{3}$ interest in a 267 acre tract of land which was a part of the deed described in the Petition in this cause, (2) pertaining to the alleged necessity of a survey, (3) pertaining to the alleged necessity of an order for the examination of Daniel Lewis relative to his cutting of timber upon the lands involved in this action, (4) pertaining to the nonjoinder of the heirs of Willie Lewis, and, (5) pertaining to the alleged necessity of police protection for a court-appointed surveyor against unlawful assaults on the part of appellants. (Record, State Court pp. 32-35.) Turnell and Morgan alleged in their verified motion that they had acquired the bid of Elmer Goode (Record, State Court pp. 35-36), who was the highest and last bidder at the commissioner's purported sale of the lands herein in-

volved and that they were willing to consummate the sale but desired clarification upon the questions which they projected. (Record, State Court pp. 32-35.)

On or about August 18, 1955, J. Frederick Simpson and Sidney Simpson filed an Answer in the above entitled proceeding in which they claim to have succeeded to the rights of certain of the Petitioners. (Record, State Court pp. 44-47.)

Sometime after the filing of Motion by Turnell and Morgan and Answer of J. Frederick Simpson and Sidney Simpson, Answer was filed by Messrs. Corbett and Fisler and I. C. Wright for appellant Daniel Lewis and his wife. (Record, State Court pp. 53-58.) The Answer among other things, denies the allegations of the original complaint relative to co-tenancy between any of the Petitioners and defendants and between Petitioners and appellant in particular (Record, State Court p. 55), denies that Petitioners had any interest in the lands described in the Petition, denies that the Court obtained jurisdiction over the parties listed in paragraph one of this statement by publication, denies that appellant was made a party defendant by proper service of process, denies that J. Frederick Simpson and Sidney Simpson had obtained any interest in the property described in the Petition and denies that a sale of the lands described in the Petition was necessary. (Record, State Court pp. 53-56.) The Answer further alleges, among other things, that appellant was the owner in fee simple of all interest which petitioners and J. Frederick Simpson and Sidney Simpson were claiming, that the children of Willie Lewis, deceased brother of appellant, owned an interest in the land described in the Petition but were not joined as parties therein, and that the Petition should be dismissed. (Record, State Court pp. 53-58.) However, this Answer was filed after the Honorable Clerk had presumed to ad-

judge the appellant as an incompetent, and after said Clerk had presumed to appoint a guardian *ad litem* for appellant. (Record, State Court p. 37.)

This matter was eventually referred to a Referee, Elbert A. Brown, Esquire. (Record, State Court p. 67.) After conducting hearing on the matters referred to, the Honorable Referee filed a report in which he found facts and made conclusions of law. (Record, State Court pp. 70-78.) It is noteworthy here to observe, however, that the Honorable Referee found that none of the petitioners owned any interest in the land described in their Petition at the time when the Petition was filed or subsequently thereto and that the Simpsons obtained no interest in the land through petitioners or in any other manner. (Record, State Court p. 75.)

A judgment of the court was entered at the April term, 1958, by Honorable J. Paul Frizzell, Judge, Presiding. (Record, State Court pp. 78-79.) The matter was before his Honor for confirmation of the Referee's Report. The judgment concludes "The Referee's Report, except as modified herein, is approved and affirmed." (Record, State Court p. 79.) The modification of the Referee's Report was in the amount to be paid to the Simpsons and the judgment read as follows on this matter:

> "J. Frederick Simpson and Sidney Simpson having claimed a large share of said funds, and the court having considered the matter and the parties hereto who are represented by counsel, having agreed subject to the approval of the court, that J. Frederick Simpson and Sidney Simpson be paid $2,000.00 from said funds, subject to any allowance hereinafter made, and the court having considered the matter and finding as a fact that is a fair and reasonable compromise settlement, approved the same." (Record, State Court p. 78.)

For a fuller account of the judgment, reference is hereby made to the full text of the judgment referred to above. (Record, State Court pp. 78-79.)

Appellant filed a motion in the cause to set aside appointment of a guardian for appellant on the 19th day of June, 1958. (Record, State Court p. 81.) Another motion in the cause was filed on the same day for the purpose of setting aside and vacating the order of sale entered by the Clerk. (Record, State Court p. 83.) A supplemental motion in the cause was filed on the 28th day of July, 1958, asserting that the record affirmatively indicated that none of the original petitioners had any interest in the lands involved and were not tenants in common with appellant and therefore, had no right to a partitioning proceeding. (Record, State Court pp. 96-99.) All the motions were supported by affidavits. (Record, State Court pp. 82-83.) Appellant also filed an affidavit relative to the employment of attorneys and disclaimed that any attorneys, other than his present counsel, have ever been authorized to represent him. (Record, State Court pp. 93 and 94.) Intervenors Turnell and Morgan, who are Appellees in this Court and in the Supreme Court of North Carolina, filed written Answer to the appellant's several motions on the 18th day of July, 1959, to wit, the same day when hearing was had upon the said motions. (Record, State Court pp. 87 to 89.) Intervenors-Appellees attacked a paper writing which purported to be a warranty deed to their Answer to appellant's motions in the cause, both being filed the day of hearing upon the motions in the cause, to wit, the 18th day of July, 1958. (Record, State Court pp. 89 to 93.)

On or about the 19th day of September, 1958, Honorable Clifton L. Moore (then Resident Judge of the Superior Court of Pender County but now an Associate Justice of the Supreme Court of North Carolina), entered Judgment

upon appellant's several motions in the cause. (Record, State Court pp. 99 to 105.) See "Appendix D" of the appendices to this STATEMENT. In his Judgment dated September 19, 1958, the Honorable Clifton L. Moore presumed to find certain facts and make certain conclusions of law. Among his findings of facts the Honorable Clifton L. Moore presumed to find the following:

> "(4) An affidavit was filed with the Clerk alleging that Daniel Lewis was old and infirm and unable to conduct his defense, and asking appointment of a guardian ad litem for him. And on July 9, 1955, the Clerk appointed such guardian ad litem. Said guardian ad litem filed a motion on July 9, 1955, to dismiss the proceedings as to Daniel Lewis because of improper service of the original summons upon him. Upon the hearing, the Clerk adjudged that he had been properly served, and, upon appeal, the Superior Court Judge affirmed the Clerk's ruling, and allowed Daniel Lewis to file answer. From this point on, Daniel Lewis defended the action in his own name, and the guardian ad litem took no further part in the proceedings." (Record, State Court p. 101.)
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> * * * * *
>
> "(10) On February 22, 1956, Daniel Lewis and wife, Lillie Lewis, for a valuable consideration over and above the price paid to said Commissioner, executed and delivered to R. M. Turnell and R. D. Morgan, co-partners, trading as Turnell and Morgan, a deed of bargain and sale, conveying all their right, title and interest in the locus in quo (described exactly as in the original petition). This deed contains full covenants and warranty, and the following provision: 'It is understood and agreed that there is a proceeding in the Superior Court of Pender County,

N. C., to sell these lands for division, and the parties of the first part retain and are to have from said proceeding whatever share of the sale price bid for said lands in said proceeding may belong to them for their share of said moneys in proportion to their interest in said lands.' This deed was recorded July 31, 1956, in Book 333, page 187, Registry of Pender County." (Record, State Court pp. 102 to 103.)

Upon the basis of the foregoing purported findings of fact, as well as upon other presumptive findings of fact which are contained in the above mentioned judgment, the Honorable Clifton L. Moore made the following conclusions of law:

"(a) That upon the conveyance by Daniel Lewis and wife of 'all their right, title and interest in' the lands in question in this cause to Turnell and Morgan, as set out in Finding of Fact 10, Daniel Lewis was no longer a real party in interest with respect to said lands, and is estopped by said conveyance to make the motions now before the Court. *Casualty Co. v. Green*, 200 NC 538. This is particularly true in view of his and his attorneys' assertion that he is now and has at all times been competent and sui juris.

"(b) That, inasmuch as Daniel Lewis does not now allege or assert that his attorneys of record, I. C. Wright and Corbet & Fisler, were without authority from him to consent to the Judgment of the Clerk, dated July 28, 1956, (Finding of Fact 8) said judgment is res judicata in this hearing as to all proceedings had before that date, particularly as to the order of sale, sale and confirmation of sale, and delivery of the deed to the purchaser. As to him and his interest in the land he waived any prior irregularity.

"(c) That as to the acts and appointment of the purported guardian ad litem, Daniel Lewis later asserted the same defenses in his own behalf as had been asserted by his supposed guardian ad litem, and he has in no way been damaged by the acts of said supposed guardian ad litem.

"(d) That Daniel Lewis is now estopped by the aforesaid judgment of the Clerk of July 28, 1956, to claim that the heirs, if any, of Willie Lewis have an interest in said lands, since he declared to the contrary before the Court on that date and his such declaration was made a part of said judgment.

"(e) Since Daniel Lewis has parted with all title and interest in said lands, he has no standing in Court to assert the rights of any other claimant with respect thereto.

"It Is Therefore Ordered, Adjudged and Decreed that said motions of Daniel Lewis, made through his attorneys, Taylor & Mitchell, are hereby denied and dismissed."

"This September 19, 1958." (Record, State Court pp. 104 to 105.) (See, also, "Appendix D" of this Statement.)

Appellant appealed from the Judgment of the Superior Court to the Supreme Court of North Carolina and filed a Bill of Exceptions to the said Judgment, which he later grouped into six Assignments of Error. Among appellant's nine enumerated Exceptions to the findings of fact of Honorable Clifton L. Moore and which were brought forward to the Supreme Court of North Carolina in appropriate Assignments of Error, are the following Exceptions:

"1. Defendants object and except to Finding of Fact #1, which is contained in the judgment of September 19, 1958, for the reason that a reading of the

Referee's report conclusively indicates that this was not a proceeding instituted by tenants in common but was a proceeding instituted by persons having no interest in the land described in the Complaint and who has no right to maintain said proceeding.

"2. Defendants object and except to Finding of Fact #4 as contained in the Judgment of September 19, 1958, for the reason that said finding of fact reads in part, as follows:

> "Upon a hearing, the Clerk adjudged that he had been properly served, and, upon appeal, the Superior Court Judge affirmed the Clerk's ruling, and allowed Daniel Lewis to file answer. From this point on, Daniel Lewis defended the action in his own name, and the guardian ad litem took no further part in the proceedings.

whereas said finding is contrary to the record in that the record does not show that the guardian ad litem was discharged or that the order of appointment was vacated.

"3. Defendants object and except to Finding of Fact #3 as contained in the Judgment of September 19, 1958, for the reason that said finding of fact concludes that Daniel Lewis through counsel withdrew his objection to sale, whereas Daniel Lewis was supposedly represented by guardian ad litem during this stage of proceeding and whereas an affidavit dated the 23rd day of July, 1958, executed by Daniel Lewis, conclusively indicates that he had authorized no attorneys to act for him and whereas said Finding of Fact #8, as indicated in this exception, is contrary to the record in this cause.

"4. Defendants object and except to Finding of Fact #10 as contained in the Judgment of September 19,

1958, for the reason that said finding of fact concludes that Daniel Lewis and wife, Lillie Lewis, for valuable consideration over and above the price paid to said Commissioner, executed and delivered to R. M. Turnell and R. D. Morgan, co-partners, trading as Turnell and Morgan, a deed of bargain and sale, conveying all of their right, title and interest in the locus in quo, whereas said finding of fact is totally outside of the scope of this proceeding, is totally unwarranted by the record in this cause, being matter which could not be adjudicated in this action and matter upon which defendants Daniel Lewis and wife, Lillie Lewis, are entitled to a hearing and day in court, which hearing and day in court the findings attempt to preclude.

"7. Defendants object and except to the Findings of Fact in the Judgment of September 19, 1958, in that the Court presumed to adjudicate matter pertaining to an alleged deed in which Daniel Lewis and wife, Lillie Lewis, were grantors and in which R. M. Turnell and R. D. Morgan are grantees, whereas defendants Daniel Lewis and wife, Lillie Lewis, were entitled to a day in court and trial by jury upon said matters and whereas adjudication of said matter was beyond the scope of the instant inquiry.

"9. Defendants object and except to the Conclusions of Law as contained in the Judgment of September 19, 1958, and to each and every Conclusion of Law as therein contained, and to each and every part of said Conclusions of Law as not being supported by Findings of Fact or the record or evidence in the instant case." (Record, State Court pp. 106 to 108.) (See, also, "Appendix E" of this STATEMENT.)

The word "Defendants," in the Bill of Exceptions as found in the Record in the State Supreme Court (see "Appendix

E" of this STATEMENT), includes appellant Daniel Lewis, who was a party defendant in the original partition proceeding and in the Superior Court of Pender County. (Record, State Court pp. 1 and 53.)

The opinion of the Supreme Court of North Carolina, while affirming Honorable Clifton L. Moore's Judgment dated September 19, 1958 (see "Appendix D" of this STATEMENT), addressed itself to the heart of appellant's contentions rather than to the tenuous estoppels upon which the Superior Court attempted to justify its Judgment against appellant. (See "Appendix A" of this STATEMENT.) The Supreme Court of North Carolina construed North Carolina General Statute 1-65.1 to permit the appointment of a guardian *ad litem* for a party defendant to a partitioning proceeding solely upon the following lay affidavit:

> "Rev. G. P. House, being duly sworn, says: Affiant is acquainted with Daniel Lewis, one of the defendants named in the above cause, and respectfully shows to the Court that he is old and infirm and utterly innocent of Court proceedings and unable by virtue of his infirm and enfeebled condition to properly conduct his defense, and suggests that a guardian ad litem should be appointed to represent him in this matter." (Record, State Court p. 37.)

The Supreme Court of North Carolina stated in part:

> "By statute, G. S. 1-65.1, the court is under a duty to appoint a guardian ad litem for infants, idiots, lunatics, or non compos defendants who have no general guardian.
>
> "(1, 2) An inquisition to determine the sanity of the defendant is not a condition precedent to the appoint-

ment. In re Dunn, 239 N.C. 378, 79 S.E. 2d 921. It may be made upon application of any disinterested person or by the court on its own motion. 44 C.J.S. Insane Persons 143(b) 307, 308. 'This is necessary, because of his presumed lack of discretion and want of capacity to understand and manage his own affairs.' *Tate* v. *Mott*, 96 N.C. 19, 2 S.E. 176, 177.

"As said in *Morris* v. *Russell*, 120 Utah 544, 236 P. 2d 451, 455, 26 A.L.R. 2d 947: 'The rule requiring guardians for incompetents is for their protection. Its purpose is not to burden or hinder them in enforcing their rights; nor to confer any privilege or advantage on persons who claim adversely to them or who may be trying to take advantage of them.'

"(3) As the court has the power to appoint, it has the power to remove, *Tate* v. *Mott*, supra; *Abbott* v. *Hancock*, 123 N.C. 99, 31 S.E. 268; and when timely objection is made by the alleged incompetent, the court should afford him ample and adequate opportunity to be heard with respect to the need for a guardian ad litem and the fitness of the appointee." (See "Appendix A" of this STATEMENT.)

In this novel manner the State Supreme Court justified the appointment of a guardian *ad litem* for appellant. It should be observed, however, that never before had the State Supreme Court held that a guardian *ad litem* could be inflicted upon a party-defendant during the pendency of a litigation without notice, hearing and inquisition into his sanity or without the submission of issues relative thereto to the jury empaneled to try the pending litigation. Cf. *In re Anderson*, 132 N.C. 243, 43 S.E. 649; *Smith* v. *Smith*, 106 N.C. 498, 11 S.E. 188; *In re Dunn*, 239 N.C. 378, 79 S.E. 2d 921.

The Supreme Court of North Carolina also addressed itself to appellant's contentions that the record conclusively indicated that none of the parties-petitioners had any interest in the land involved and that the land involved was owned solely by parties-defendants, none of whom had petitioned for an actual partition of their land or partition by sale of it and none of whom had agreed that the court might sell their land for partition by sale. The State Supreme Court answered this serious contention with the following language:

> "The findings of the referee, confirmed on appeal, established a cotenancy. The owners were before the court. This gave the court power to order the sale.
>
> "The findings of the referee, confirmed on appeal, negative the assertion now made by movant that Willie Lewis or his children have an interest in the property. This finding is beneficial to movant. It enlarges his share in the property. If, as movant now asserts, there are outstanding rights, they must speak for themselves. Movant does not assert any authority to speak for them. That their rights might be affected does not make him a party aggrieved." (See Opinion of the State Supreme Court, "Appendix A" of this STATEMENT.)

Thus it conclusively appears that the Supreme Court of North Carolina has subscribed to the surprising and shocking proposition that the North Carolina statute which permits a sale of realty for partition, to wit, North Carolina General Statute 46-22, will support a sale of realty upon petition of strangers to the title of said realty or upon the petition of said realty or upon the petition of claimants whose claim of interest in the said realty is totally disproven.

After the filing of the Opinion by the Supreme Court of North Carolina, appellant filed a Petition to Rehear in the State Supreme Court in the manner and form as required by the Rules of the Supreme Court of North Carolina, to wit, Rule 44. (See "Appendix B" of this STATEMENT.) In their Petition to Rehear, appellant alleged, among other things, State Supreme Court's constructions and interpretations of North Carolina General Statute 1-65.1, which pertained to the appointment of guardian *ad litem*, and of North Carolina General Statute 46-22, which pertains to partition by sale; rendered the same void and unconstitutional as applied to appellant. No answer to appellant's petition was filed by appellee or by the intervenors, Turnell and Morgan. On the 24th day of June, 1959, the State Supreme Court entered an order in which it denied appellant's petition to rehear. (See "Appendix C" of this STATEMENT.) On the 22nd day of September, 1959, appellant filed notice of appeal to this Court in the Supreme Court of North Carolina. (See "Appendix G" of this STATEMENT.)

The Questions Presented Are Substantial

A. The Sale of Appellant's Property

The Record from the Court below conclusively indicates that the Superior Court of Pender County presumed to order a sale of appellant's property and to confirm a sale of it without the making of necessary and jurisdictional findings of facts relative to the impossibility of actual division. (See *Seawell* v. *Seawell*, 233 N.C. 735, 65 S.E. 2d 369; *Wolfe* v. *Galloway*, 211 N.C. 361, 190 S.E. 213.) See Record in the State Court, pages 17 and 18; 30 and 31; 68 to 70. The Record from the Court below also indicates that the referee's hearing held *after sale*, to de-

termine the interest held by the presumed parties to the partition proceeding, disclosed that none of the parties-petitioners nor their successors in interest had any interest in the lands involved in this proceeding (Record, State Court pp. 70 to 78), and that this conclusion was confirmed by the Judge of the Superior Court in a Judgment entered during the April, 1958 Term of Court. (Record, State Court, pp. 78 to 79.) The Record further disclosed that all parties defendants were never before the court. Indeed, the Opinion of the State Supreme Court allows as much as seen from its language as follows:

> "The findings of the referee, confirmed on appeal, negative the assertion now made by movant that Willie Lewis or his children have an interest in the property. This finding is beneficial to movant. It enlarges his share in the property. If, as movant now asserts, there are outstanding rights, they must speak for themselves. Movant does not assert any authority to speak for them. That their rights might be affected does not make him a party aggrieved." (See "Appendix A," this STATEMENT.)

Finally, none of the owners of the land involved in this proceeding—who are presumably joined and parties-defendants—ever petitioned for or requested an actual partition of their land or for a partition of it by sale. It must be observed that the land consisted of a total acreage of more than three hundred acres (Record, State Court, pp. 8 to 10), of which appellant was found by the referee to be the owner in fee of more than a majority of the interest therein. (Record, State Court, pp. 70 to 78.) In view of these shocking facts, all of which were known to the several courts below, it was a confiscation of appellant's land for the benefit of private purchasers to sell it at the

instance of total strangers to title and right of possession. Such a privation strikes at the heart of the rights and immunities which are thought to be safeguarded by the 14th Amendment to the Constitution of the United States. In support of appellant's position, appellant submits the following authorities: *Owendey* v. *Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L. ed. 837; *Ochoa* v. *Hernandes Y. Morales*, 230 U.S. 139, 33 S.Ct. 1033, 57 L. ed. 1427; *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L. ed. 215; *Scott* v. *McNeal*, 154 U.S. 34, 14 S.Ct. 1108, 38 L. ed. 896; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L. ed. 1027; *Londoner* v. *Denver*, 210 U.S. 385, 28 S.Ct. 708, 52 L. ed. 1105; *Saunders* v. *Shaw*, *supra*. The fact that appellant's deprivation was wrought by the Supreme Court of North Carolina through its construction and interpretation of a legislative enactment does not mitigate the injury to appellant or rescue it from the reach of the 14th Amendment to the Constitution of the United States. Cf. *Chicago etc., Railroad Company* v. *Chicago, Ill.*, 166 U.S. 235, 17 S.Ct. 581, 41 L. ed. 979; *National Association for Advancement of Colored People* v. *State of Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L. ed. 2d 1488.

B. The Appointment of a Guardian *ad Litem*

The Supreme Court of North Carolina has "taken the bull by the horns" and has decided that North Carolina General Statute 1-65.1 will permit of the summary appointment of a guardian *ad litem* for a litigant to a proceeding involving his estate and interest in land upon the affidavit of a "lay stranger" to the proceeding that the litigant is "old and infirm and utterly innocent of Court proceeding and unable by virtue of his infirm and enfeebled condition to properly conduct his defense" and upon the affiant's

lay suggestion "that a guardian ad litem should be appointed to represent him. . . ." (Record, State Court, p. 7.) It should be noted that the Courts below have not troubled themselves to appoint a guardian for appellant upon his pursuit of his after judgment motions through the same court and through the Supreme Court of North Carolina. It is also of interest to note that the appellant's infirm and enfeebled condition did not endear themselves to the Superior Court of Pender County when he was lodged in jail for a duration of nine days upon commitment of six months (North Carolina General Statute 5-4 only permits a 30-day jail sentence of contempt of a restraining order), for the contempt of a restraining order against him which was procured by parties to this action having no interest in his land. (Record, State Court, pp. 121-124.) Moreover, the Supreme Court of North Carolina has interpreted and construed North Carolina General Statute 1-65.1 with the instant case as a particular background. The 14th Amendment to the Constitution of the United States will not permit such a summary deprivation of appellant's right and privilege to conduct his litigation in his own way and to be heard prior to a denial of such rights and privileges. Cf. *Grojean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L. ed. 660; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. ed. 1070. It is no answer to appellant to say that after the appointment of a guardian for him that the Court extended him the grace of allowing him to appear, testify and participate in proceeding without the attendance of his guardian *ad litem*. *Security Trust and S. B. Co. v. Lexington*, 203 U.S. 323, 27 S.Ct. 87, 51 L. ed. 204.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code, as is indicated above.

Respectfully submitted,

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APPENDIX A

No. 174 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1959

FLORA TRUDY MOORE (Widow) *et al.*,

—vs.—

DANIEL LEWIS, *et ux.*, *et al.*,

OPINION OF THE COURT

APPEAL by Daniel Lewis as movant from *Moore (C.L.), J.*, in Chambers at BURGAW on 19 September 1958.

A proceeding for partition, as here entitled, was instituted in 1953. In 1954 a default judgment was entered and sale for partition ordered. The property was offered for sale several times and resales ordered because of increased bids. A sale was made 1 March 1955 at which time a bid of $9,600 was offered. This sale was confirmed and the commissioner was directed to convey upon payment of the purchase money. Following this order the assignee of the successful bidder moved for a survey to determine the boundaries separating the land owned by Daniel Lewis individually from the land sold. The motion also asserted that Daniel Lewis had cut valuable timber from the property sold and should be required to account for the timber cut and enjoined from further cutting. In May 1955 Lewis was cited for contempt for violation of an order enjoining him from cutting timber. He was found in contempt and imprisoned. An affidavit was thereupon filed by a dis-

interested person stating that Daniel Lewis was old, infirm, and unable to properly conduct his defense. A guardian *ad litem* was appointed.

Daniel Lewis thereupon employed counsel. They filed a motion asserting no proper process had ever been served on Daniel Lewis, and for that reason the orders theretofore entered were void. This motion was overruled and the questioned service adjudged valid. On appeal, Judge Williams, in September 1955, affirmed the adjudication as to service, but permitted Lewis to answer. Pursuant to the permission given, an answer verified by Lewis was filed. It denied the asserted cotenancy and asserted the lands were owned solely by Daniel Lewis and the heirs of Willie Lewis. Process was served on the heirs of Willie Lewis by publication. A guardian *ad litem* was appointed to represent them.

On 28 July 1956 a consent order was entered which recites that Daniel Lewis had withdrawn his objection to confirmation of the $9,600 bid. The controversy as to ownership was, by the order, transferred to the fund and the cause placed on the civil issue docket. A reference was ordered. The referee conducted hearings, made his report including findings of fact and conclusions of law. Daniel Lewis testified at these hearings. The report was filed 19 January 1958. At the April 1958 Term Judge Frizzelle modified the findings and as modified confirmed the report and rendered judgment decisive of the rights of the parties. No exceptions were taken to that judgment. The clerk thereupon distributed the purchase monies paid to him in July 1956. His report showing distribution was confirmed 12 May 1958.

In June 1958 Daniel Lewis, acting through his present counsel, filed two motions to set aside the orders for the sale and confirmation. Answers were filed by all interested parties. Judge Moore heard the motions, made findings of fact, and denied the motions. Daniel Lewis excepted and appealed.

Taylor & Mitchell for defendant, appellant.
Clark, Clark & Grady for appellees Turnell and Morgan.
Corbett & Fisler and Isaac C. Wright, amici curiae.

Rodman, J. The motions to set aside the orders of sale and confirmation are based on these assertions: (1) Daniel Lewis was at all times competent to manage his affairs; hence the order appointing a guardian to act for him was invalid, rendering all subsequent proceedings void. (2) The heirs of Willie Lewis had not been properly served with process and, as they were necessary parties, the court was without power to direct a sale.

These motions were not verified by Daniel Lewis, but by one of his present attorneys. Daniel Lewis made an affidavit which recites the employment of present counsel with plenary power to act for him, confirming in advance any action they might take in his behalf. The affidavit contained this statement: "(T)hat since the entry of the purported judgment in this cause by Honorable J. Paul Frizzelle at the April Term, 1958, affiant has been represented in the instant cause solely by Messrs. Taylor and Mitchell and has not authorized any other attorney or attorneys to represent him; that any acts or representations of any attorney or attorneys subsequent to the entry of the above mentioned purported judgment, other than by Messrs. Taylor and Mitchell, have not been authorized by affiant, and are not the acts or representations of affiant or on behalf of affiant." The only action taken subsequent to the judgment of April 1958 was the distribution of the purchase money in conformity with the provision of that judgment.

By statute, G.S. 1-651, the court is under a duty to appoint a guardian *ad litem* for infants, idiots, lunatics, or *non compos* defendants who have no general guardian.

An inquisition to determine the sanity of the defendant is not a condition precedent to the appointment. *In re Dunn*,

239 N.C. 378, 79 S.E. 2d 921. It may be made upon application of any disinterested person or by the court on its own motion. 44 C.J.S. 307, 308. "This is necessary, because of his presumed lack of discretion and want of capacity to understand and manage his own affairs." *Tate* v. *Mott*, 96 N.C. 19.

As said in *Morris* v. *Russell*, 26 A.L.R. 2d 947: "The rule requiring guardians for incompetents is for their protection. Its purpose is not to burden nor hinder them in enforcing their rights, nor to confer any privilege or advantage on persons who claim adversely to them or who may be trying to take advantage of them."

As the court has the power to appoint, it has the power to remove. *Tate* v. *Mott*, *supra*; *Abbott* v. *Hancock*, 123 N.C. 99; and when timely objection is made by the alleged incompetent, the court should afford him ample and adequate opportunity to be heard with respect to the need for a guardian *ad litem* and the fitness of the appointee. *Graham* v. *Graham*, 240 P. 2d 564.

Here the appointment was made after movant had been sentenced to jail for contempt of court. The application for the appointment was not made by a party to the litigation but by a minister who swore movant was, on account of age, incompetent and "utterly innocent of court proceedings." Movant also filed an affidavit stating "I am an old colored man, utterly ignorant of Courts and Court proceedings."

The appointment was made in July 1955. The motion to vacate the appointment was made in June 1958.

It is not suggested that the appointee was incompetent or interested in the litigation.

By the intervention of the guardian *ad litem* a default judgment was vacated and movant was permitted to answer. Judge Moore found: "From this point (order permitting the filing of answer) Daniel Lewis defended the

action in his own name, and the guardian *ad litem* took no further part in the proceedings."

In view of this finding, supported as it is by the evidence, the mere failure of the court *ex mero motu* to enter an order vacating the appointment cannot be held to have prejudiced the rights of movant. Such a holding would substitute formality for practicality.

If movant were here complaining of a loss of rights resulting from the abdication and inaction of the guardian, the finding would justify remedial action for the protection of his ward. But movant does not complain of inaction. He merely asserts the appointment was not authorized. He nowhere indicates how the appointment prevented him from asserting his rights. It follows that the court correctly denied the motion based on the assertion that the appointment of the guardian *ad litem* made all subsequent proceeding void or irregular. *Lovett* v. *Stone*, 239 N.C. 206, 79 S.E. 2d 179.

The findings of the referee, confirmed on appeal, established a cotenancy. The owners were before the court. This gave the court power to order the sale.

The findings of the referee, confirmed on appeal, negative the assertion now made by movant that Willie Lewis or his children have an interest in the property. This finding is beneficial to movant. It enlarges his share in the property. If, as movant now asserts, there are outstanding rights, they must speak for themselves. Movant does not assert any authority to speak for them. That their rights might be affected does not make him a party aggrieved. *In re Application for Reassignment*, 247 N.C. 413, 101 S.E. 2d 359; *Gregg* v. *Williamson*, 246 N.C. 356, 98 S.E. 2d 481; *Templeton* v. *Kellen*, 216 N.C. 487, 5 S.E. 2d 555; *Casualty Co.* v. *Greene*, 200 N.C. 535, 157 S.E. 797.

Affirmed.

MOORE, J., took no part in the consideration or decision of this case.

APPENDIX B

No. 174 — Fifth District

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1959

From Pender

Flora Trudy Moore (Widow), *et al.*,

—vs.—

Daniel Lewis, *et ux.*, *et al.*

NOTICE

To the Honorable Clerk of the Supreme Court of North Carolina:

Petitioner-defendant Daniel Lewis respectfully requests that the attached Petition to Rehear be submitted to the Honorable Justices, R. Hunt Parker and William H. Bobbitt, Associate Justices of this Court, for their consideration.

Respectfully submitted,

/s/ Taylor & Mitchell
Taylor & Mitchell
Attorneys for petitioner-defendant Daniel Lewis

No. 174 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1959

FROM PENDER

FLORA TRUDY MOORE (Widow), *et al.*,

—VS.—

DANIEL LEWIS, *et ux.*, *et al.*

PETITION TO REHEAR

Petitioner-Defendant Daniel Lewis, by and through his attorneys, Messrs. Taylor and Mitchell of Raleigh, North Carolina, hereby files this Petition to Rehear, pursuant to Rule 44 of the Rules of this Court, and in support hereof, respectfully shows the following matter unto the Court:

I

This Court entered its Opinion in the above entitled case on the 8th day of April, 1959, in which it affirmed the Judgment of the Superior Court of Pender County. The Superior Court of Pender County entered its Judgment, from whence the appeal in this Court was taken, on the 19th day of September, 1959. The Judgment of the Superior Court was signed and entered by Honorable Clifton L. Moore, in Chambers, then Resident Judge of the Fifth District and now Associate Justice in this Court. Honorable Clifton L. Moore, though a member of this Court when this appeal was heard, took no part in the consideration of decision by this Court of this case.

II

The Judgment complained of in this Court, in the appeal which was lately pending here, was a ruling entered upon motions in the cause which were filed subsequent to order of confirmation of sale and various judgments and orders in a proceeding which was originally instituted for the purpose of partitioning by sale, certain lands among alleged tenants in common. The Judgment complained of in this Court, in the appeal which was lately pending here, overruled motions filed by petitioner-defendant, in which petitioner-defendant sought to vacate the orders of sale and confirmation of sale of the land described in the partitioning proceeding, and to vacate an order appointing a guardian ad litem for petitioner-defendant. In the nature of petitioner-defendant's proceeding upon his several motions to vacate, no bond or undertaking to secure the orders and judgments below, which petitioner-defendant sought to vacate, or to secure Respondents, was required in the proceeding below upon petitioner-defendant's motions to vacate. However, petitioner-defendant filed the undertaking required by the court below in this Court, to secure cost on appeal, and has paid all costs assessed against him in this Court, or in the court below. Moreover, the Judgment of the Superior Court, affirmed by this Court, confirms the title of Respondents Turnell and Morgan and their successors, who are in possession of the premises involved. Hence, for all practical purposes and for the purposes of Rule 44 of the Rules of this Court, the judgments herein complained of have been fully performed. Nevertheless, petitioner-defendant will forthwith execute and file such bond or undertaking in support of this Petition to Rehear as this Court, in its discretion, may adjudge to be necessary and sufficient.

III

1. Petitioner-defendant, as a basis and predicate for his Allegation of Error number 1, respectfully directs this Court's attention to the following matter which is contained in or is obvious from the Record in this cause and in the Opinion of this Court.

(a) This Honorable Court has inadvertently overlooked and misinterpreted certain vital and indisputable matters in the Record in this cause, by concluding that the findings of the referee established a co-tenancy between the original petitioners and original defendants in the partition proceedings, thus, justifying and supporting the previously entered order of sale. Upon this matter, this Honorable Court's Opinion reads as follows:

> "The finding of the referee, confirmed on appeal, established a co-tenancy. The owners were before the Court. This gave the Court power to order of sale," 250 N.C. 77, at page 81.

(b) This finding is directly contrary to the Referee's Report and to the Record before this Court. The Referee found that the lands described in the original petition for partition by sale were formerly owned by one Robert (sic. Richard?) Lewis, deceased, whose heirs were his sons Fred Lewis and Harry C. Lewis and the children of a third son, Jackson Lewis, who predeceased him. (R. p. 71) Petitioner-defendant, Daniel Lewis, is one of the grandchildren of the original owner, Richard Lewis, being the son of Jackson Lewis, deceased, who was one of the three sons of Richard Lewis, the original owner. (R. pp. 10, 11 and 71) The Referee specifically found the following facts:

> "4. The 195-acre tract of land shown on the Court Map is owned by Daniel Lewis and the heirs of Addie Pridgen. Robert Lewis died in 1909 and left surviving

him two sons, namely, Fred Lewis and Harry C. Lewis. Also, two children of a deceased son, Jackson Lewis. (Addie Pridgen and Daniel Lewis.)

"5. That on or about April 1, 1931, Fred Lewis sold all of his interest in his father's estate in and to the lands in controversy to Daniel Lewis, and Daniel Lewis took possession under a paper writing reading as follows:

"Apr. 1, 1931
Currie, N. C.

This is to certify that Fred Lewis has sold to R. D. Lewis his part of land of the Richard Lewis—his father's estate which contains 134 acres more or less, which for his part is bounded on the north by Black River, on the South by Leone Lewis Est., on the West by D. L. Brinkley and R. D. Lewis. The said parcel of land is in Pender Co. Caintuck Township.

Fred Lewis."

"6. That on the 27th day of July, 1935, Fred Lewis, by deed conveyed his interest to Daniel Lewis, along with the then living heirs of Harry C. Lewis, to wit: Vander Bannerman, Trudy Moore, Carrie Moore, Manella Cremartie; the said deed being recorded on the 28th day of December, 1954, in Book 328, at page 63, of the Pender County Registry. Daniel Lewis went into sole possession of the lands in question, and as shown on the Court Map, more than twenty years prior to March 3, 1953, and has held same openly and adversely to all persons; cutting timber on said lands from time to time, paying taxes on said lands and exercising acts of ownership, dominion, control and possession of said lands for more than twenty years prior to March 3, 1953. That said acts of ownership and control over said

lands, as exercised by Daniel Lewis, amounted to an ouster of any and all tenants in common to said lands (if any); that said Daniel Lewis has had sole adverse possession of said lands for more than twenty years prior to March 3, 1953, and that none of the other heirs of said Harry Lewis or Fred Lewis (after his death), made any claim to any part of said lands until this special proceeding was instituted on March 3, 1953.

"7. That Daniel Lewis held all of said lands, by adverse possession and under color of title, for more than twenty years, and more than seven years, respectively; that said possession had ripened into title by adverse possession and in fee simple prior to the institution of this proceeding.

"8. There were several advertisements and resales and at one of these resales, J. Frederick Simpson and Sidney Simpson became the last and highest bidder, the bid at one time being more than $5,000.00.

"9. Pending these resales and before the final sale, J. Frederick Simpson and Sidney Simpson procured options and later Warranty Deeds from the following persons, which deeds are recorded in the Pender County Registry, to wit:

Trudy Moore, Book 272, page 461, Registered December 6, 1954;
Hattie Andrews, Book 272, page 462;
Lloyd Lewis, Book 272, page 462;
Blanche Larkins, Book 272, page 459, Registered November 30, 19 ;
Violet Kea, Book 272, page 484, Registered February 1, 1955.

"10. Daniel Lewis set up in his pleadings that he was the sole owner of the lands in question, denied

the title and claim of J. Frederick Simpson and Sidney Simpson, and denied the title and claim of all persons and averred that their grantors had not title to convey, and further that they (Simpsons) were nor purchasers for valuable considerations, without notice, within the meaning of the Statute, and as such are protected under G. S. 47-18.

"11. J. Frederick Simpson and Sidney Simpson in their Petition in this cause do not allege that they were purchasers for value, but at the hearing did offer certain deeds, which they rely upon for title and recites a consideration, and offered same against the claim of Daniel Lewis.

"12. It was conceded that the said J. Frederick Simpson and Sidney Simpson had no claim to the 195-acre tract of land, as shown on the Map, and the Referee finds that this property (195-acre tract) at the time was reasonably worth one-third of the sale price of the entire property, inasmuch as a large amount of the timber had never been cut from the said 195-acre tract.

"13. Referee further finds that the heirs of Addie Pridgen owned a one-half interest in the 195-acre tract and that Daniel Lewis owned a one-half interest therein."

(c) Upon the foregoing findings of facts, as well and other findings of facts the Referee made Conclusions of Law which included the following:

"1. That Fred Lewis had sold his interest to Daniel Lewis, and his Deed or Contract, though poorly drawn, is color of title as against anyone except purchasers for valuable consideration, and amounted at least to

a contract to convey real property, if not a conveyance. *Robinson* v. *Daughtry*, 171 N.C. 200.

That Daniel Lewis had been in possession of the said lands under color of title for more than seven years; and in fact, had held said land under known and visible boundaries and adversely, for more than twenty years, prior to March 3, 1953, and therefore was the owner of said lands by adverse possession.

"2. That Fred Lewis having conveyed his entire interest in said lands had nothing to convey and nothing to be inherited by his heirs, and therefore his heirs inherited nothing from said Fred Lewis, and therefore had nothing to convey to J. Frederick Simpson and Sidney Simpson; this being true, the purported deed from the heirs of Fred Lewis to J. Frederick Simpson and Sidney Simpson was a nullity, or at least did not convey any interest in the lands in question. *Hargrave* v. *Adcock*, 111 N.C. 166; *King* v. *McRacken*, 168 N.C. 621.

"3. That as to the heirs of Harry Lewis, their deeds, though void for want of joinder of their husbands amounted to color of title. *Garner* v. *Horner*, 191 N.C. 639; *King* v. *McRacken*, 168 N.C. 621."

"7. That the heirs of Addie Pridgen, as shown in the record are entitled to one-half of the proceeds from the 195-acre tract, and that Daniel Lewis is entitled to the remainder of the funds paid into Court, after all Court-costs, expenses incurred in this proceeding, have been paid;

But that J. Frederick Simpson and Sidney Simpson shall be refunded $385.00, which is the aggregate amount paid by them for the deeds to the persons executing same, as set out in paragraph 6."

(d) The Referee's Report was confirmed by the Superior Court of Pender County in a Judgment which was entered by Honorable J. Paul Frizzelle on the 28th day of April, 1958. Although the said Judgment of Honorable J. Paul Frizzelle approved of an "agreement" that J. Frederick Simpson and Sidney Simpson be paid $2,000.00 from funds in the hands of the Clerk of Pender County Superior Court, all of the Referee's findings and conclusions were "approved and affirmed." (R. pp. 78 and 79) Neither the Referee's Report nor the Judgment of Honorable J. Paul Frizzelle, found or concluded that any of the 13 original petitioners, all of whom claimed through Fred Lewis, deceased, and Harry C. Lewis, deceased, had any interest in any of the land involved in the partition proceeding which they had instituted (R. pp. 70-79). The Referee's Report, affirmed by Honorable J. Paul Frizzelle (R. pp. 78 and 79), specifically found and concluded that J. Frederick Simpson and Sidney Simpson acquired no interest from the five original petitioners who purported to convey their alleged interest to them after the institution of the partition proceeding in the court below. (R. pp. 72-78) And the Referee's Report and the Judgment of Honorable J. Paul Frizzelle specifically concluded against the interest of each and all of the original petitioners. (R. pp. 77, 78 and 79)

Wherefore, petitioner-defendant assigns his Allegation of Error number 1:

(1). To the inadvertence and misunderstanding of this Honorable Court in erroneously concluding that the Referee's Report in this case, or the Record in this cause, is supportive of the theory that co-tenancy existed between any of the original petitioners and the original defendants in the action below, since the Referee's Report and the Record in this cause conclusively indicate that the converse was the true state of the facts.

(2) To the above mentioned inadvertence and misunderstanding of this Honorable Court, since this Honorable Court has, in effect and for all practical purposes, affirmed an unlawful and unconstitutional condemnation and confiscation of the property of petitioner-defendant, for the private use and profit of private individuals, contrary to Article I, Section 17 of the Constitution of North Carolina and to the Privileges and Immunities, Due Process and Equal Protection Clauses of the Constitution of the United States.

(3) To the above mentioned inadvertence and misunderstanding of this Honorable Court, as specified in (1) of this Allegation of Error, since this Honorable Court has, in effect and for all practical purposes, affirmed an unlawful and unconstitutional application of North Carolina General Statute 46-22 to the facts of the instant case to such extent that North Carolina General Statute 46-22 is unconstitutional as applied by this Honorable Court and by the court below, to the facts of this case and upon the instant Record, resulting in and directly causing an unlawful and unconstitutional condemnation and confiscation of the property of petitioner-defendant for the private use and profit of the original petitioners below and others, and resulting in, and causing an unlawful and unconstitutional denial to petitioner-defendant of the fundamental privilege and right of holding, possessing and enjoying his property free and secure against the unfounded and disproven claims of the original petitioners below and others—all in contradiction of Article I, Section 17 of the North Carolina Constitution, and in contradiction of the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States.

(4) To the above mentioned inadvertence and misunderstanding of this Honorable Court in condoning and affirm-

ing a civil action for partition by sale of real property, which resulted in a judgment or judgments against petitioner-defendant, wherein none of the parties-plaintiffs were real parties in interest or co-tenants with petitioner-defendant; in condoning and affirming a judgment or judgments against petitioner-defendant in an action wherein the court below never acquired jurisdiction over the land which it presumed to order sold for partition; in condoning and affirming a judgment or judgments against petitioner-defendant, wherein real property was ordered sold and sold upon order of the court below for partition, in an action wherein none of the tenants in common of the lands so ordered sold and sold upon order of the court below, desired or requested partition in any manner whatsoever—all in direct contradiction of Article I, Section 17 of the North Carolina Constitution and in direct contradiction of the Due Process Clause of the Constitution of the United States.

2. Petitioner-defendant, as a basis and predicate for his Allegation of Error number 2, respectfully direct this Court's attention to the following matter which is contained in or is obvious from the Record in this cause and in the Opinion of this Court:

(a) This Honorable Court has concluded in its Opinion in this cause that the appointment of a guardian ad litem under North Carolina General Statute 1-65.1 for an adult who is neither an idiot or lunatic or non compos mentis and over whose sanity no inquisition has been held, is not invalid. This Honorable Court has also held, in effect, that the appointment of a guardian ad litem for petitioner-defendant, if improper, was not prejudicial to him.

(b) The opinion of this Honorable Court also finds, contrary to the Record, that the guardianship became quiescent after petitioner-defendant was "allowed" to assert his

claim to the funds derived chiefly from the sale of his land. Indeed, this Court's Opinion inadvertently and mistakingly assumes that the Learned Judge below had before him evidence supportive of his finding to this effect. However, the Stipulations of Counsel as to the contents of the Record on Appeal specifically reads:

> "It is hereby stipulated and agreed by and between the undersigned attorneys that the foregoing shall constitute the record on appeal in this cause, the said matter being all of the matter which is before His Honor Clifton L. Moore, upon the motions in the cause which were filed by defendant Daniel Lewis, . . ." (R. p. 2)

A perusal of the Record before this Court in the instant cause, indicates that there was no evidence to support the conclusion of the Learned Judge below, that the guardianship became quiescent after petitioner-defendant was "allowed" to assert his claim to the funds in the hands of the Clerk of Court and which were derived chiefly from the sale of his land. To the contrary, is the finding of the Clerk of Court, made after the entry of the Judgment of Honorable J. Paul Frizzelle, which Judgment affirmed the Referee's Report on the 4th day of April, 1958. (R. pp. 79 and 80)

(c) The Opinion of this Honorable Court also finds that the appointment of a guardian ad litem for petitioner-defendant was made after petitioner-defendant was excessively sentenced to jail for civil contempt for a "term of six (6) months, unless earlier discharged by this Court." (R. p. 122) The Record in this cause indicates that this illegal commitment was procured by an attorney for J. Frederick Simpson and Sidney Simpson on May 18, 1955, upon the strength of their claim upon petitioner-defendant lands

(R. pp. 114-122), which the Referee later held to be invalid and to be no interest in petitioner-defendant's lands. (R. pp. 70-78) The affidavit which procured the guardianship was as follows:

> "Rev. G. P. House, being duly sworn, says: Affiant is acquainted with Daniel Lewis, one of the defendants named in the above cause, and respectfully shows to the Court that he is old and infirm and utterly innocent of Court proceedings and unable by virtue of his infirm and enfeebled condition to properly conduct his defense, and suggests that a guardian ad litem should be appointed to represent him in this matter.
>
> /s/ Rev. G. P. House"

WHEREFORE, petitioner-defendant assigns his Allegation of Error number 2:

(1) To the interpretation and construction by this Honorable Court and by the court below of North Carolina General Statute 1-65.1, as applied to petitioner-defendant, whereby a guardian ad litem was appointed for petitioner-defendant in a litigation concerning his interest in land wthout notice to him or to his family of said appointment—all in contradiction and in violation of petitioner-defendant's rights under Article I, Section 17, of the Constitution of North Carolina and under the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States.

(2). To the interpretation and construction by the Honorable Court and by the court below, of North Carolina General Statute 1-65.1, as applied to petitioner-defendant, whereby a guardian ad litem was appointed for petitioner-defendant in a litigation concerning his interest in land without hearing or adjudication of petitioner-defendant's

mental competence—all in contradiction and violation of petitioner-defendant's rights under Article I, Section 17, of the Constitution of North Carolina and under the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States.

(3) To the interpretation and construction by this Honorable Court and by the court below of North Carolina General Statute 1-65.1, as applied to petitioner-defendant, for whom a guardian ad litem was unlawfully, irregularly and unconstitutionally appointed in a litigation concerning his interest in land, after the same court had committed him to jail under an excessive and void sentence for alleged civil contempt of an injunction against his use of his own land, had released him only after imprisonment for nine days upon his agreement to advise with *named* counsel and "to abide by all orders of the Court in this cause with respect to cutting timber," had presumed without notice or hearing—to appoint a guardian ad litem for him upon "it having been suggested to the Court that the said Daniel Lewis is not competent to manage his affairs because of old age and mental weakness"—all in substantial denial and abridgement of petitioner-defendant's right to conduct his litigation in his own way, through counsel of his choice and without the intervention and the influence of a guardian ad litem of the coercion of the court and all in substantial denial and abridgement of rights guaranteed to petitioner-defendant by Article I, Section 17 of the North Carolina Constitution and by the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States.

(4) To this Honorable Court's application of North Carolina General Statute 1-65.1 to petitioner-defendant, in view of the attendant and known circumstances of the

instant case and the proceedings below, which application of said statute resulted in a substantial denial and abridgment of petitioner-defendant's rights, under Article I, Section 17 of the North Carolina Constitution and under the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States, to conduct his legal affairs free of and unhampered by the intervention and infection of an invalid and unconstitutional appointment, existence and influence of a void guardianship, and the coercive influence and constraint of the court below, by virtue of and through the medium of the said invalid and unconstitutional appointment, existence and influence of the said void guardianship.

3. Petitioner-defendant assigns his Allegation of Error number 3:

(1) To the failure of this Honorable Court to hold or conclude that the non-joinder of the heirs of Willie Lewis, deceased, was a jurisdictional defect which made void all judgments and orders touching petitioner-defendant's land or interest in land;

(2) To the inadvertence or misunderstanding in the Opinion of this Honorable Court, wherein it is stated, "The findings of the Referee, confirmed on appeal, negative, the assertion now made by movant, that Willie Lewis or his children have an interest in the property;"

(3) To the failure of this Honorable Court to hold or conclude that a co-tenant's interest in the land jointly owned with another or others, includes the continuing right to continue the co-tenancy, where there is filed a petition for partition, by sale until all co-tenants are lawfully bound by a judgment for partition by sale;

(4) To the failure of this Honorable Court to conclude that the heirs of Addie Pridgen were never made parties to the partitioning proceeding below and that jurisdictional defect made void all judgments and orders touching petitioner-defendant's land or his interest therein;

(5) To the failure of this Honorable Court to conclude that if all owners are not joined in a partitioning proceeding for sale of common property, a party-defendant who is joined has the continuing right to possession and enjoyment of the common property until all owners are joined and that he has standing to assert the lack of jurisdiction by the court to sell the common property.

(6) To this Honorable Court's application and construction of North Carolina General Statute 46-22, as applied to petitioner-defendant, whereby this Court concludes, contrary to Article I, Section 17 of the North Carolina Constitution and to the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution, that a tenant in common who was joined in a proceeding for partition by sale may not assert the court's lack of jurisdiction to sell the common property by reason of the court's failure to acquire jurisdiction over all of the co-owners and thereby to acquire jurisdiction over the property involved.

IV

This Petition to Rehear is accompanied by the certificate of two members of the bar of this Court, who have no interest in the subject matter, who have not been of counsel for either party to the suit and each of whom has been at least five years a member of the bar of this Court. A copy of this Petition to Rehear, together with a copy of the accompanying certificates of counsel, is contemporaneously herewith being forwarded to Messrs. Clark, Clark and Grady.

who were counsel on appeal in this Court for Appellee Turnell and Morgan.

V

This Petition is Respectfully endorsed to Honorable R. Hunt Parker and Honorable William H. Bobbitt, Associate Justices of this Court, neither of whom dissented from this Court's Opinion in this Cause.

Respectfully submitted,

/s/ TAYLOR & MITCHELL

TAYLOR & MITCHELL
125 East Hargett Street
Raleigh, North Carolina
Counsel for Petitioner-defendant Daniel Lewis

APPENDIX C

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1959

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify that in connection with the petition to rehear filed by the defendant Daniel Lewis on May 14th, 1959 in the case of *Flora Trudy Moore (Widow), et al.* against *Daniel Lewis, et ux., et al.*, the following is a true and correct copy of the memorandum order issued by the two Justices of the Supreme Court of North Carolina to whom the petition was referred:

> "Examined and denied. This 24th of June 1959. R. Hunt Parker, Associate Justice. William H. Bobbitt, Associate Justice."

It is further certified that the foregoing order is a true and correct copy of the original on file in this office.

Witness my hand and official seal this the 12th day of November 1959.

/s/ Adrian J. Newton
Clerk of the Supreme Court of North Carolina

(Seal)

APPENDIX D

IN THE SUPERIOR COURT NORTH CAROLINA

PENDER COUNTY

FLORA TRUDY MOORE *et als.*,

—vs.—

DANIEL LEWIS *et als.*

JUDGMENT

This cause came on to be heard and was heard before the undersigned Judge in chambers at Burgaw, N. C., on July 18, 1958, upon written motions of Daniel Lewis, which are hereinafter more fully referred to.

There were the following appearances of counsel at the hearing aforesaid: John J. Best, attorney for original petitioners; I. C. Wright and Leon H. Corbett (of the firm of Corbett & Fisler), attorneys of record for Daniel Lewis; S. S. Mitchell (of the firm of Taylor & Mitchell), attorney for Daniel Lewis at this hearing; E. B. Clark (of the firm of Clark and Clark), attorney for Turnell and Morgan; W. E. Blake, attorney for Frederick and Sidney Simpson.

The Court heard the arguments of counsel, read and considered their written briefs, read and considered all pleadings (which were voluminous and all of which were offered in evidence), papers and records in the cause, and read and considered all affidavits and documentary evidence offered at the hearing.

Upon the foregoing, the Court finds the following facts:

(1) This cause was instituted March 3, 1953, as a special proceeding, before the Clerk of the Superior Court of

Pender County, for the sale of land for partition among tenants in common. The land involved consisted of approximately 497 acres.

(2) The said Clerk made an order of sale on August 30, 1954, and appointed John J. Best commissioner to make said sale. There was a sale and five resales. The final resale was confirmed on March 15, 1955. The successful bidder was Elmer Gooden, and the price was $9,600.00. Elmer Gooden duly assigned his bid to R. M. Turnell and R. D. Morgan, partners, trading as Turnell and Morgan.

(3) Turnell and Morgan filed a motion in the cause on March 23, 1955, asking for corrections of certain alleged defects in the proceedings and for clarification of certain factual matters. Among other things, they sought, (a) a survey of the land, (b) to ascertain the interest of Daniel Lewis in a portion of the land, (c) that service of summons be made on the heirs of Willie Lewis, and (d) to determine the interest, if any, of Frederick Simpson and Sidney Simpson in the land, under a deed of record from some of the alleged tenants in common. This motion was personally served on Daniel Lewis and said Simpsons on March 24, 1955.

(4) An affidavit was filed with the Clerk alleging that Daniel Lewis was old and infirm and unable to conduct his defense; and asking appointment of a guardian ad litem for him. And on July 9, 1955, the Clerk appointed such guardian ad litem. Said guardian ad litem filed a motion of July 9, 1955, to dismiss the proceedings as to Daniel Lewis because of improper service of the original summons upon him. Upon the hearing, the Clerk adjudged that he had been properly served, and, upon appeal, the Superior Court Judge affirmed the Clerk's ruling, and allowed Daniel Lewis to file answer. From this point on, Daniel Lewis defended

the action in his own name, and the guardian ad litem took no further part in the proceedings.

(5) In the meanwhile, Frederick and Sidney Simpson, upon their motion, were allowed to intervene, and they filed pleadings asserting an interest in the locus in quo.

(6) On October 3, 1955, Daniel Lewis and wife filed verified Answer to both the original petition and the motion of Turnell and Morgan, alleging, among other things, (a) that there had been no proper and lawful service of the original summons upon them, (b) all services by publication on other defendants were void, (c) that the heirs of Willie Lewis had not been made parties, (d) that the Court was without jurisdiction to proceed and that all prior orders and proceedings should be vagated, (e) that Frederick and Sidney Simpson owned no interest in the land, (f) that Daniel Lewis owned all the land except the interest of the heirs of Willie Lewis, and (g) that the price bid for the land was inadequate.

(7) Early in 1956 new services by publication were made on out-of-the-State parties and on unknown claimants and those not in esse. A guardian ad litem was appointed for unknown parties and those not in esse, and he filed answer admitting the allegations of the original petition and asserting that the land had been sold for a fair price.

(8) That on July 28, 1956, the Clerk signed a judgment declaring that the sale of the land for division was necessary, that the sale of the land for $9600.00 is confirmed, that Daniel Lewis through counsel withdraws his objection to said sale and the price bid therefor; that Daniel Lewis stated, according to his information, that there were no claimants of the land "who lived in Florida" (supposed heirs of Willie Lewis), that the Commissioner shall make and deliver deed to the purchaser, collect the proceeds and

report to the Court, that the conflicting claims of the various parties as to their interests in the land be transferred to the proceeds of the sale, and the cause be transferred to the Civil Issue Docket to determine the respective interests of the parties. Clark & Clark, attorneys for Turnell and Morgan, and I. C. Wright and Corbett & Fisler, attorneys for Daniel Lewis, consented in writing to this judgment. The Judgment was approved by the Resident Judge of Superior Court.

(9) Deed from John J. Best, Commissioner, to Turnell and Morgan, for the locus in quo was delivered and was recorded on July 31, 1956, in Book 333, page 185, in the Registry of Pender County. The purchase price was paid and deposited with the Court. The Commissioner filed his report of sale.

(10) On February 22, 1956, Daniel Lewis and wife, Lillie Lewis, for a valuable consideration over and above the price paid to said Commissioner, executed and delivered to R. M. Turnell and R. D. Morgan, co-partners, trading as Turnell and Morgan, a deed of bargain and sale, conveying "all their right, title and interest in" the locus in quo (described exactly as in the original petition). This deed contains full covenants and warranty, and the following provision: "It is understood and agreed that there is a proceeding in the Superior Court of Pender County, N. C., to sell these lands for division, and the parties of the first part retain and are to have from said proceeding whatever share of the sale price bid for said lands in said proceeding may belong to them for their share of said moneys in proportion to their interests in said lands." This deed was recorded July 31, 1956, in Book 333, page 187, Registry of Pender County.

(11) Subsequently, the matter of the respective interests in the fund was submitted to a referee. The referee filed

his report, which was affirmed at the April Term, 1958, by a Judge of the Superior Court, with the exception that a compromise settlement was approved whereby Frederick and Sidney Simpson received $2,000.00 for their interest. After payment of this sum of $2,000.00, payment to other claimants, payment of costs and taxes, the share of Daniel Lewis amount to $4,855.00. The fund was disbursed by checks. There was no appeal from the Judge's order or the disbursement. Daniel Lewis has not cashed his check.

(12) On June 11, 1958, Daniel Lewis, through his attorneys, Taylor & Mitchell, filed two motions in this cause with the Clerk, to the effect that Daniel Lewis desired to own and retain his proportionate share of the land in severalty, that the Court was without jurisdiction in the cause to sell said land, and that all proceedings, orders and judgments in the cause (particularly the order of sale and confirmation) be vacated and set aside, for that, (a) the heirs of Willie Lewis own a 1/9 interest in the lands and were not made parties, (b) that the referee found that Daniel Lewis owned a 5/6 interest, and that therefore the land could have been actually partitioned as a matter of fact, (c) that the services by publication in the cause were not in accordance with the statute and were void, and (d) that Daniel Lewis has been at all times heretofore and is now competent and sui juris, that the purported appointment of a guardian ad litem for him was not in accordance with law and was void, and the acts of said guardian in his behalf are void.

(13) On June 16, 1958, the Clerk denied the motions and the movant appealed. The matter came on to be heard before the undersigned as before stated.

Upon the foregoing findings of fact, the Court is of the opinion as a matter of law:

(a) That upon the conveyance by Daniel Lewis and wife of "all their right, title and interest in" the lands in question in this cause to Turnell and Morgan, as set out in Finding of Fact 10, Daniel Lewis was no longer a real party in interest with respect to said lands, and is estopped by said conveyance to make the motions now before the Court. *Casualty Co.* v. *Green*, 200 NC 535. This is particularly true in view of his and his attorneys' assertion that he is now and has at all times been competent and sui juris.

(b) That, inasmuch as Daniel Lewis does not now allege or assert that his attorneys of record, I. C. Wright and Corbett & Fisler, were without authority from him to consent to the Judgment of the Clerk, dated July 28, 1956 (Finding of Fact 8) said judgment is res judicata in this hearing as to all proceedings had before that date, particularly as to the order of sale, sale and confirmation of sale, and delivery of the deed to the purchaser. As to him and his interest in the land he waived any prior irregularity.

(c) That as to the acts and appointment of the purported guardian ad litem, Daniel Lewis later asserted the same defenses in his own behalf as had been asserted by his supposed guardian ad litem, and he has in no way been damaged by the acts of said supposed guardian ad litem.

(d) That Daniel Lewis is now estopped by the aforesaid judgment of the Clerk of July 28, 1956, to claim that the heirs, if any, of Willie Lewis have an interest in said lands, since he declared to the contrary before the Court on that date and his such declaration was made a part of said judgment.

(e) Since Daniel Lewis has parted with all title and interest in said lands, he has no standing in Court to assert the rights of any other claimant with respect thereto.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said motions of Daniel Lewis, made through his attorneys Taylor & Mitchell, are hereby denied and dismissed.

This September 19, 1858.

/s/ CLIFTON L. MOORE, Resident Judge of Superior Court, Fifth Judicial District of North Carolina.

To the foregoing judgment, and to each finding of fact and conclusion of law, movant Daniel Lewis excepts and appeals to the Supreme Court. Notice of appeal given in apt time in open Court. Further notice is waived. Daniel Lewis is allowed 60 days within which to make up and serve case on appeal. Respondents are allowed 30 days thereafter in which to make up and serve countercase or exceptions. Appeal bond in amount of $250.00 is approved.

/s/ CLIFTON L. MOORE
Judge of Superior Court.

APPENDIX E

IN THE SUPERIOR COURT ORTH CAROLINA

PENDER COUNTY

FLORA TRUDY MOORE *et als.*,

—VS.—

DANIEL LEWIS *et als.*

EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DATED SEPTEMBER 19, 1958

Now come defendants Daniel Lewis and wife, Lillie Lewis, through and by their attorneys, Taylor & Mitchell, of Raleigh, North Carolina, and specifically except to Findings of Fact, Conclusions of Law and Judgment entered in this cause on the 19th day of September, 1958, in the following manner:

1. Defendants object and except to Finding of Fact #1, which is contained in the judgment of September 19, 1958, for the reason that a reading of the Referee's report conclusively indicates that this was not a proceeding instituted by tenants in common but was a proceeding instituted by persons having no interest in the land described in the Complaint and who had no right to maintain said proceeding.

2. Defendants object and except to Finding of Fact #4 as contained in the Judgment of September 19, 1958, for the reason that said finding of fact reads in part, as follows:

> "Upon a hearing, the Clerk adjudged that he had been properly served, and, upon appeal, the Superior Court Judge affirmed the Clerk's ruling, and allowed Daniel Lewis to file answer. From this point on, Daniel Lewis

defended the action in his own name, and the guardian ad litem took no further part in the proceedings.

whereas said finding is contrary to the record in that the record does not show that the guardian ad litem was discharged or that the order of appointment was vacated.

3. Defendants object and except to Finding of Fact #3 as contained in the Judgment of September 19, 1958, for the reason that said finding of fact concludes that Daniel Lewis through counsel withdrew his objection to sale, whereas Daniel Lewis was supposedly represented by guardian ad litem during this stage of proceeding and whereas an affidavit dated the 23rd day of July, 1958, executed by Daniel Lewis, conclusively indicates that he had authorized no attorneys to act for him and whereas said Finding of Fact #3, as indicated in this exception, is contrary to the record in this cause.

4. Defendants object and except to Finding of Fact #10 as contained in the Judgment of September 19, 1958, for the reason that said finding of fact concludes that "Daniel Lewis and wife, Lillie Lewis, for valuable consideration over and above the price paid to said Commissioner, executed and delivered to R. M. Turnell and R. D. Morgan, co-partners, trading as Turnell and Morgan, a deed of bargain and sale, conveying all of their right, title and interest in the locus in quo," whereas said finding of fact is totally outside of the scope of this proceeding, is totally unwarranted by the record in this cause, being matter which could not be adjudicated in this action and matter upon which defendants Daniel Lewis and wife, Lillie Lewis, are entitled to a hearing and day in court, which hearing and day in court the finding attempts to preclude.

5. Defendants object and except to Finding of Fact #12 as contained in the Judgment of September 19, 1958, in that the Court failed to adjudicate or notice a Supplemental

Motion in Cause, which was executed on the 26th day of July, 1958, and forthwith filed with the record in this cause and which was before the Court during its decision in this matter and prior to rendition of its Judgment.

6. Defendants object and except to the Findings of Fact in the Judgment of September 19, 1958, in that said Findings of Fact do not purport to find facts relative to defendants' Supplemental Motion in Cause, which was executed the 26th day of July, 1958, and which was before the Court prior to its rendition of judgment in this matter.

7. Defendants object and except to the Findings of Fact in the Judgment of September 19, 1958, in that the Court presumed to adjudicate matter pertaining to an alleged deed in which Daniel Lewis and wife, Lillie Lewis, were grantors and in which R. M. Turnell and R. D. Morgan are grantees, whereas defendants Daniel Lewis and wife, Lillie Lewis, were entitled to a day in court and trial by jury upon said matters and whereas adjudication of said matter was beyond the scope of the instant inquiry.

8. Defendants object and except to all other findings of fact in judgment of September 19, 1958, not specifically mentioned in these exceptions and defendants object and except to each and every part of each every finding of fact as formulated by the Court in its judgment of September 19, 1958.

9. Defendants object and except to the Conclusions of Law as contained in the Judgment of September 19, 1958, and to each and every Conclusion of Law as therein contained, and to each and every part of said Conclusions of Law as not being supported by Findings of Fact or the record or evidence in the instant cause.

This 29th day of September, 1958.

/s/ TAYLOR & MITCHELL, Raleigh, N. C.,
Attorneys for Defendants Daniel Lewis and wife, Lillie Lewis.

APPENDIX F

IN THE SUPERIOR COURT NORTH CAROLINA

PENDER COUNTY

FLORA TRUDY MOORE *et al.*,

—VS.—

DANIEL LEWIS *et al.*

ASSIGNMENTS OF ERROR

The defendant Daniel Lewis, groups his Exceptions and assigns error as follows:

1. The Court committed prejudicial and reversible error in its Judgment of September 9, 1958, by finding as a fact the following:

> "(1) This cause was instituted March 3, 1953, as a special proceeding before the Clerk of the Superior Court of Pender County, for the sale of land for partition among tenants in common . . ."

for the reason that a reading of the referee's report and of the Judgment of Honorable J. Paul Frizzelle, entered during the April Term, 1958, along with the entire Record in this cause conclusively indicates that this was not a proceeding instituted by tenants in common but was a proceeding instituted by persons having no interest in the land described in the original Petition of March 3, 1953, or involved in the instant controversy and who had no right to maintain the said proceeding, to which error Exceptions number 1, 8 and 9 and the Appeal in this cause are directed.

2. The Court committed prejudicial and reversible error in its Judgment of September 19, 1958, by findings facts as follows:

> "(4) An affidavit was filed with the Clerk alleging that Daniel Lewis was old and infirm and unable to conduct his defense, and asking appointment of a Guardian ad litem for him. And on July 9, 1955, the Clerk appointed such Guardian ad litem. Said Guardian ad litem filed a motion of July 9, 1955, to dismiss the proceedings as to Daniel Lewis because of improper service of the original summons upon him. Upon the hearing the Clerk adjudged that he had been properly served, and, upon appeal, the Superior Court Judge affirmed the Clerk's ruling, and allowed Daniel Lewis to file answer. From this point on, Daniel Lewis defended the action in his own name, and the Guardian ad litem took no further part in the proceedings."

whereas, said Finding of Fact is contrary to the record and to fact, in that the record does not show that the Guardian ad litem was discharged or that the order of appointment was vacated; in that said Finding of Fact will not support a legal conclusion that the irregular, improper and illegal appointment of a Guardian ad litem for defendant Daniel Lewis had no bearing upon the proceeding in this cause; in that the record conclusively shows that the appointment of the Guardian ad litem and the Guardian ad litem himself permeated the entire record and proceedings in this cause; in that the record in this cause conclusively shows that the court's adjudication that it had jurisdiction over the defendant Daniel Lewis was made upon *process initiated by the "Guardian ad litem" and prosecuted by said "Guardian ad litem"*, as indicated by the court in its Finding of Fact number 4; and by the record in this cause, to which error

Exceptions number 2, 8 and 9 and the Appeal in this cause are directed.

3. The Court committed prejudicial and reversible error in its Judgment of September 19, 1958, in Finding of Fact number 8 thereof, in that the Court finds that Daniel Lewis through counsel withdrew his objection to sale, whereas Daniel Lewis was supposedly represented by "Guardian ad litem" during this stage of proceeding, as indicated by the record in this cause and whereas an affidavit dated the 23rd day of July, 1958, executed by Daniel Lewis, conclusively indicates that he had authorized no attorneys to act for him and whereas said Finding of Fact number 8, as indicated by the record in this cause, is contrary to the instant record, to which error Exception number 3, 8, and 9 and the Appeal in this cause are directed.

4. The Court committed prejudicial and reversible error in its Judgment of September 19, 1958, by finding in Finding of Fact number 10 that "Daniel Lewis and wife, Lillie Lewis, for valuable consideration over and above the price paid to said Commissioner, executed and delivered to R. M. Turnell and R. D. Morgan, co-partners, trading as Turnell and Morgan, a deed of bargain and sale, conveying all of their right, title and interest in the locus in quo," whereas said Finding of Fact is totally outside of the scope of this proceeding, is totally unwarranted by the record in this cause, being matter which could not be adjudicated in this action, and matter upon which defendants Daniel Lewis and wife, Lillie Lewis, are entitled to a hearing, trial by jury and day in court, which hearing, trial by jury and day in court the Judgment of September 19, 1958, attempts to preclude, to which error Exception number 4, 7, 8 and 9 and the Appeal in this cause are directed.

5. The Court committed prejudicial and reversible error in its Judgment of September 19, 1958, by failing to adjudi-

cate or notice a Supplemental Motion in cause, which was filed in this cause on July 28th, 1958, and which was before the Court during its decision in this matter and prior to rendition of its Judgment, to which error Exception number 5, 6, 8 and 9 and the Appeal in this cause are directed.

6. The Court committed prejudicial and reversible error by Entry of its Judgment of September 19, 1958, in that the record in this cause will not support the Judgment so entered nor the Finding of Facts or Conclusions of Law therein contained and in that the record conclusively indicates that the Court should have granted the Motions filed by defendant Daniel Lewis on June 11, 1958 and July 28, 1958, to vacate the orders of sale and confirmation of sale and to dismiss the petitioners proceedings for partition of land for lack of jurisdiction over necessary parties petitioners and parties-defendants and over the defendant Daniel Lewis in particular and over the lands involved in the instant controversy, to which error Exceptions 1, 2, 3, 4, 5, 6, 7, 8 and 9 and the Appeal in this cause are directed.

Respectfully submitted,

/s/ TAYLOR & MITCHELL

TAYLOR & MITCHELL
125 East Hargett Street
Raleigh, North Carolina
Attorneys for Defendant Daniel Lewis

APPENDIX G

No. 174 — Fifth District

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1959

From Pender

Flora Trudy Moore (Widow), *et al.*,

—vs.—

Daniel Lewis, *et ux.*, *et al.*

CERTIFICATE OF SERVICE OF NOTICE OF APPEAL

The undersigned attorney of record for appellant hereby certifies that a copy of this notice of appeal is contemporaneously with the filing hereof being forwarded to Messrs. Clark, Clark and Grady, counsel for Appellees Turnell and Morgan, by regular United States Mail.

This 22nd day of September, 1959.

s/ Samuel S. Mitchell
Samuel S. Mitchell
Of Counsel for Appellant
Daniel Lewis

No. 174 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1959

FROM PENDER

FLORA TRUDY MOORE (Widow), *et al.*,

—vs.—

DANIEL LEWIS, *et ux., et al.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Daniel Lewis, appellant in this Court, hereby appeals to the Supreme Court of the United States from an Order of this Court of June, 1959, denying his Petition for a re-hearing upon the Judgment and Opinion of this Court of April 8, 1959, which affirmed the Judgment of the Superior Court of Pender County. Notice is further hereby given that appellant hereby appeals to the Supreme Court of the United States from the Order of June 24, 1959, which denied a re-hearing upon the Judgment and Opinion of this Court of April 8, 1959, for that, the Judgment and Opinion of this Court affirmed the Superior Court of Pender County in denying appellants several motions in the cause to vacate and set aside the Order of Sale and Order of Confirmation entered in this cause in the court below, and the appointment of a guardian ad litem for appellant in the said court.

2. Notice is hereby given that Daniel Lewis, appellant in this Court, hereby appeals to the Supreme Court of the United States from the Order of this Court of June 24,

1959, for that, the above mentioned Order upholds, affirms and applies unconstitutional applications and interpretations of North Carolina General Statute 46-22 and 1-65.1 to appellant and the instant cause of action, over appellant's protestations objections and Petition to rehear, thereby resulting in and causing an unlawful and unconstitutional confiscation of the property of appellant for the private use and profit of appellees and thereby resulting in and causing an unlawful and unconstitutional denial to appellant of the fundamental right to conduct his litigation in his own way and without the intercession of an illegally appointed guardian ad litem.

3. This appeal is taken pursuant to 28 U. S. 1257(2).

4. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in the said transcript the following:

(a) The Record in this cause as filed and printed for the use of the Supreme Court of North Carolina during the Spring Term, 1959, number 174, and which Record indicated and included all of the proceedings and matter which were before Honorable Clifton L. Moore, Judge of the Superior Court, at the hearing of July 18, 1959, in the Superior Court of Pender County.

(b) The Opinion of the Supreme Court of North Carolina which was filed April 8, 1959.

(c) The Judgment of the Supreme Court of North Carolina, which was entered upon the Opinion of the Supreme Court of North Carolina and which affirmed the Judgment of the Superior Court of Pender County.

(d) Petition to Rehear which was filed by appellant May 14, 1959.

(e) The Order of the Supreme Court of North Carolina of June 24, 1959, which denied appellant's Petition to Rehear.

(f) Notice of Appeal to the Supreme Court of the United States, with attached Certificate of Service of Notice of Appeal.

5. The following questions are presented by the Appeal:

(a) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation and application of North Carolina General Statute 46-22 to the facts of the instant case and to appellant, whereby appellant's property has been condemned and confiscated for the private use and profit of other individuals, to wit, appellees, and whereby appellant has been denied the fundamental privilege and right of holding, possessing and enjoying his property free and secure against the unfounded and disproves claims of others, contrary to the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States?

(b) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation and application of North Carolina General Statute 46-22 to the facts of the instant case and to appellant whereby appellant's real property was ordered sold and sold upon order of the court below for partition, in an action wherein none of the tenants in common of the lands so ordered sold and sold upon order of the court below, desired or requested or assented to partition in any manner whatsoever or were parties petitioners invoking any relief under North Carolina General Statute 46-22?

(c) Is North Carolina General Statute 46-22, as interpreted and construed by the Supreme Court of North Caro

lina constitutional, when measured by the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States, where applied to the sale for partition of lands in an action in which none of the owners of the lands sold for partition desire, request or assent to partition of any description and where some of the owners of the said land so sold are not before the court?

(d) Has the Supreme Court of North Carolina applied, affirmed and upheld an unconstitutional interpretation and application of North Carolina General Statute 1-65.1, as applied to the instant case and to appellant, under which statute the said Court has approved and sanctioned the appointment of a guardian ad litem for appellant without hearing or adjudication of appellant's mental competence in a manner contrary to the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States?

(e) Has the Supreme Court of North Carolina upheld, affirmed, and applied an unconstitutional interpretation and application of North Carolina General Statute 1-65.1, whereby appellant was required to be represented by a guardian ad litem in litigation concerning his interests and rights in land although presumably and judicially competent to handle his own affair, when the said interpretation and application is measured by the standards of the Privileges and Immunities, Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States?

(f) Is North Carolina General Statute 1-65.1, as interpreted and construed by the Supreme Court of North Carolina, constitutional, when measured by the Privileges and Immunities, Due Process and Equal Protection Clause of

the 14th Amendment to the Constitution of the United States, where applied to the appointment of and representation by a guardian ad litem of one presumably and judicially competent and willing to handle his own affairs and litigation in a matter touching, concerning and involving his interests and rights in land?

This 22nd day of September, 1959.

TAYLOR & MITCHELL

By /s/ SAMUEL S. MITCHELL
Samuel S. Mitchell
Counsel for Appellant
Daniel Lewis